Supreme Court, U.S.
FILED

041656 JUN 3 - 2005

OFFICE OF THE CLERK

NO. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term 2004

JOHN P. SUTTON,

Petitioner,

v.

RHI HOTELS, INC.

Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

JOHN P. SUTTON
Attorney at Law
2421 Pierce Street
San Francisco, CA 94115-1131
Telephone: (415) 929-7408
Facsimile: (415) 922-2885
Petitioner

QUESTIONS PRESENTED

1. Did the Ninth Circuit unreasonably narrow Rule 60(b)(1) by requiring a motion under the rule to be filed within thirty days of the judgment from which relief is sought?

2. Did the Court of Appeals depart from the accepted and usual course of judicial proceedings under Rule 60(b)(1), so as to call for this Court's supervisory power?

3. Did the Court of Appeals decide an important federal question in conflict with the decisions of other courts of appeals on the same matter?

CORPORATE DISCLOSURE STATEMENT

Petitioner Sutton is a California attorney not related to any corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CITATIONS	iv
APPENDIX	vi
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT PROVISIONS INVOLVED	1-2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
ARGUMENT	6
CONCLUSION	13

TABLE OF CITATIONS

Page

Cases

Ackermann v. United States, 340 U.S. 193, 197 (1950) 11
Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808 (4th Cir. 1988)..... 12
Bateman v. U.S. Postal Service, 231 F.3d 1220, 1222 (9th Cir. 2000)..... 11,13
Blois v. Friday, 612 F.2d 938, 940 (5th Cir. 1980) 12
Gila River Ranch, Inc. v. United States, 368 F.2d 354, 357 (9th Cir. 1966)..... 5,7,8,9,10,11
Klapprott v. United States, 335 U.S. 601, 615 (1949).. 8
Phonometrics, Inc. v. Hospitality Franchise, Inc. et al., Case No. 97-8125 (S.D.FL) 2,3,4,8,9,10
Phonometrics, Inc. v. Holiday Inns, Federal Circuit Appeal No. 03-1290. 9
Phonometrics, Inc. v. Hyatt, Federal Circuit Appeal No.03-1004 9
Phonometrics, Inc. v. Inter-Continental, Federal Circuit Appeal No. 03-1291. 9
Phonometrics, Inc. v. Sheraton, Federal Circuit Appeal No. 02-1417 9
Phonometrics, Inc. v. Westin, Federal Circuit Appeal No. 02-1501 9
Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 394 (1993)..... 12,13
Radack v. Norwegian America Line Agency, Inc., 316 F.2d 538, 542 (2nd Cir. 1963)..... 8
Tate v. Riverboat Servs., Inc., 305 F. Supp. 2d 916 (N.D. Ind. 2004) 12
Union Pacific R. Co. v. Progress Rail Services, 256, F.3d 781, 783 (8th Cir. 2001)..... 11

Walter v. Blue Cross & Blue Shield United of Wisconsin, 181 F.3d 1198, 1202 (11th Cir. 1999).. 12

Statutes

28 U.S. C. § 1254(1)..... 1
28 U.S.C. § 1291..... 1
28 U.S.C. § 1331..... 1
28 U.S.C. § 1927..... 1, 2,3,6,9,10,passim
35 U.S.C. §285..... 3

Rules

Federal Rule of Appellate Procedure 3 3,4,8
Federal Rule of Civil Procedure 60(b) and 60(b)(1) i,1,2,5,7,8-9,passim

Treatises

Wright, Miller and Kane, *Federal Practice and Procedure* (2nd Ed. 1995) at §2851..... 7
§2857..... 9
§2858..... 11
§2872, at fn. 2..... 10

APPENDIX

Page

APPENDIX A — A-1 to A-21

Order Granting in Part and Denying in Part Defendants' Joint Verified Motion for Attorneys' Fees and Costs, dated August 14, 2002

APPENDIX B — A-22 to A-33

Jenkins Judgment or Order Denying Rule 60 Motion, dated February 13, 2004

APPENDIX C — A-34 to A-38

Ninth Circuit Opinion, filed March 10, 2005

APPENDIX D — A-39 to A-40

Notice of Appeal to the Federal Circuit, filed November 13, 1998

APPENDIX E — A-41 to A-42

Notice of Appeal to the Federal Circuit, submitted May 9, 2002

APPENDIX F — A-43 to A-44

Notice of Appeal to the Federal Circuit, filed March 5, 2003

APPENDIX G A-45 to A-52

RHI Hotels' Certification of Judgment for Registration in Another District, dated May 13, 2003

PETITION FOR A WRIT OF CERTIORARI

John P. Sutton, the attorney who has been sanctioned under 28 U.S.C. § 1927, prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to justly interpret Rule 60(b)(1) so that the merits of the claim can be decided.

OPINIONS BELOW

The district court in Florida awarded attorney fees to Respondent against Petitioner on August 14, 2002, based on 28 U.S.C. § 1927. Appendix A (A-1-21) is the Florida Judgment.

The district court in California awarded attorney fees against Petitioner on February 13, 2004, based upon a foreign judgment that had been appealed. Appendix B (A-22-33) is the California district court opinion.

The Ninth Circuit affirmed on March 10, 2005 on the ground that the motion to correct the mistake was not filed within 30 days of the judgment. Appendix C (A-34-38) is the Ninth Circuit opinion.

JURISDICTION

The district court had jurisdiction over the federal question (28 U.S.C. § 1927) under 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S. C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Federal Rule of Civil Procedure Rule 60. Relief From Judgment or Order

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake
>
> * * *
>
> justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.

28 U.S.C. 1927. Counsel's liability for excessive costs

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

Petitioner is an attorney representing Phonometrics, Inc., a company that owned a patent, now expired, for call accounting for long distance calls made by businesses or hotel guests, for example. In 1996, Phonometrics sued two dozen or so hotel chains for infringement of its patent in *Phonometrics, Inc. v. Hospitality Franchise, Inc. et al.* The case was transferred by the Judicial Panel on Multidistrict Litigation to the Southern District of Florida in 1997, and became Case No.

97-8125 ("the Action"). The district court dismissed, *sua sponte*, the Action and all other pending Phonometrics cases on the ground that the Complaints failed to state a claim upon which relief could be granted.

Phonometrics filed a Notice of Appeal of the dismissal on November 12, 1998 in the form shown in Appendix D (A-39-40). The form of this Notice of Appeal is just like the one appealing the award to Respondent that is here in question, except the date of the order differs.

The Federal Circuit reversed the motion to dismiss and remanded the Action to the district court for further proceedings. Defendants in this Action and others filed motions for summary judgment in the district court, all of which were granted. Phonometrics filed a Notice of Appeal of the Action, submitted on May 9, 2002 as shown in Appendix E (A-41-42). Again, the form of the Notice of Appeal was the same Appendix D.

Many Defendants filed a Joint Motion for awards of attorney fees against Phonometrics under 35 U.S.C. §285, as well as sanctions against Petitioner under 28 U.S.C. §1927. The district court granted the awards of attorney fees, under both § 285 and § 1927. A Notice of Appeal was filed on March 3, 2003 (Appendix F, A-43-44). The form of the Notice of Appeal was same as Appendices D and E.

Appendices D, E and F are all in precisely the same form as required by Fed. R. App. P. 3: the party taking the appeal is named; the order being appealed is designated; and the court to which the appeal is taken is listed. Appendix F, however, has a clerical mistake in that the

orders in the Joint Motion for Awards of Attorney Fees bore two dates, February 5 and 10, 2003, and the second date was omitted through clerical error. Rule 3 does not require the date of the order appealed to be included in the designation.

One of the Defendants in the Action, Respondent RHI Hotels, Inc., submitted to the Clerk of the Southern District of Florida that no appeal had been filed in the Action, and asked that the judgment be certified to the Northern District of California, where Petitioner resides (Appendix G). The Clerk certified the judgment on May 13, 2003, which was then filed in San Francisco.

Although the Action was appealed to the Federal Circuit, that court held that it did not have "jurisdiction" to consider the appeal as to Respondent because it somehow ceased to be a Defendant in the Action. There was no motion to sever Respondent from the Action. It had not been severed from the Action in the prior appeals of the Action. It had joined in the Joint Motion for Award of Attorney Fees that was granted as to all Defendants in the Action who sought the award, and was not separated out from the rest. The grant of the Joint Motion on August 14, 2002 (Appendix A, A-1-21) was not an appealable order, however, because a sum certain was not set forth for each Defendant in the Action. The appealable orders were contained in separate orders for each Defendant with its award. The Orders were dated February 5 and February 10, 2003 for all of the Joint Movants. Because the Notice of Appeal had only February 5, 2003, the Federal Circuit held that it lacked jurisdiction to hear the appeals of the awards to the Joint Movants whose orders happened to be dated five days later. They were still Joint Movants, and

did not cease to be simply because their orders were dated February 10. Phonometrics sought review of the holding of no jurisdiction by the Federal Circuit, but the Petition for Writ of Certiorari was denied in Petition No. 03-1255.

The Northern District of California felt bound by the Federal Circuit ruling that Respondent had been severed from the Joint Motion, and denied Petitioner's motion for relief against a debtor's examination of Petitioner. Petitioner filed a motion for relief under Rule 60(b)(1) based on the mistake in not including both the February 5 and 10 dates in the Notice of Appeal. However, the district court in California held that a Rule 60(b)(1) motion had to be filed within thirty days after the Judgment of February 10, 2003, and Petitioner's motion was more than thirty days, but less than one year, following the Judgment (Appendix B, A-22-33).

The district court believed that the Ninth Circuit has a different rule from Rule 60(b)(1) that requires such motion to be filed within thirty days, not within a reasonable time not exceeding one. The Ninth Circuit affirmed on March 10, 2005 (Appendix C, A-34-38). This Petition seeks review of the Ninth Circuit decision.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit applied the "rule" of *Gila River Ranch* that a Rule 60(b)(1) mistake can only be cured if relief is sought within 30 days of the order or judgment. That Rule conflicts with the language of Rule 60(b) itself if 30 days is not a "reasonable" period, as well as cases in this Court and in other Circuits. A clerical mistake in listing the date of the order appealed in March 2003 does not constitute a "fail[ure] to properly appeal" (A-36). Nor does it

constitute a "'mistake[]' of judge[] or a "mistake[] in the application of the law" (A-37). Rather, it was a simple clerical mistake by a lawyer that was sought to be corrected within a reasonable period.

ARGUMENT

The issue here is whether a simple oversight by an attorney or his amanuensis in failing to recite that orders awarding attorney fees to seventeen Defendants against Petitioner on a Joint Motion for such awards (A-3) were issued on both February 5 and February 10, 2003. Some of the orders on the Joint Motion bore the earlier date and some bore the later date. The Notice of Appeal, however, bore only the earlier date (A-44), even though all twelve of the remaining defendants, including Respondent, were listed in the Notice of Appeal (A-43). The form of the Notice of Appeal was the same as in two earlier appeals of the same case (A-39, A-41). Respondent represented to the Clerk of the district court that "no notice of appeal" had been filed (A-45) even though it knew that a timely appeal had been filed in the clerk's office and was served upon Respondent. The clerk certified the judgment for registration in the Northern District of California where Petitioner resides. The award of all defense costs of $124,000 under 28 U.S.C. §1927 to Respondent was entered by the Northern District of California, even though all other awards on the Joint Motion have been set aside or dismissed as not being limited to "excess costs" under §1927.

The net result is that a simple mistake of omitting "and 10" between "February 5" and "2003" led to this dispute over $124,000 awarded to Respondent unjustly because it was not for "excess costs."

Petitioner sought to correct the mistake in the Federal Circuit, which did correct the mistake as to one of the Defendants, Four Seasons, but it held that it lacked "jurisdiction" over Respondent and other Defendants in the case who joined in the Joint Motion, but whose orders were dated February 10. Petitioner sought to correct the mistake by Rule 60(b) motion in the Florida Court (that has awarded millions of dollars in attorney fees against Petitioner and his client, only to have them set aside on appeal) and in the California court (that was affirmed by the Ninth Circuit and led to this Petition).

The Ninth Circuit held that Petitioner "failed to properly appeal this award" (A-36), and that it was powerless to correct what it regarded was a "mistake" of a judge "in the application of the law" (A-37) under the case of *Gila River Ranch, Inc. v. United States*, 368 F.2d 354, 357 (9th Cir. 1966) (A-38). The mistake was a clerical one in Petitioner's office, not a mistake of a judge and not a mistake of law. Rule 60(b) permits correction of such mistakes within a reasonable period not exceeding one year. The Ninth Circuit, however, held that the mistake here had to be corrected within thirty days of the award, notwithstanding the clear language of the Rule. This Court and other circuit courts have held that Rule 60(b) should be interpreted to do substantial justice.

Wright, Miller and Kane, *Federal Practice and Procedure* (2nd Ed. 1995) at §2851 explain that Rule 60 attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." The Ninth Circuit applied the wooden rule of *Gila* that relief under Rule 60(b)(1) must be

sought within 30 days of the order sought to be relieved. *Gila* and the Ninth Circuit decision here stand in sharp contrast to decisions of this Court and other circuits. For example, *Klapprott v. United States*, 335 U.S. 601, 615 (1949) said that "[f]air hearings are in accord with the elemental concepts of justice, and the language of the 'other reason' clause of 60(b) is broad enough to authorize the Court to set aside a default judgment and grant petitioner a fair hearing."

The Second Circuit, citing *Klapprott*, said that "subject to the one-year time limitation when the grounds urged for relief fall within clauses (1), (2) or (3), the rule should be liberally construed when substantial justice will thus be served." *Radack v. Norwegian America Line Agency, Inc.*, 316 F.2d 538, 542 (2nd Cir. 1963).

Here, a timely Notice of Appeal was filed containing the three needed elements of Fed. R. App. P. 3. There is no requirement in Rule 3 for the date of the order to be set forth. By mistake, the Notice of Appeal contained only the date February 5, 2003, when some of the Joint Movants were sent orders on February 10, 2003, granting the awards sought in the Joint Motion.

The district court clerk in Florida mistakenly certified that no appeal had been filed in the *Hospitality Franchise* case, when in fact a Notice of Appeal (A-43-44) in precisely the same form as in prior appeals of the Action (A-39-40 and A-41-42) had been filed with the clerk in a timely manner.

The California district court refused to correct the mistake in the date, and denied the motion under Rule

60(b)(1) on the ground that *Gila* requires such a motion to be filed within thirty days. The Ninth Circuit affirmed on the basis of *Gila*.

On the merits, the awards of all defense costs to Defendants in Phonometrics cases have been set aside as an abuse of discretion in the appeal of the Action that went forward as to the February 5 orders, severed from the February 10 orders. The awards were also set aside in *Sheraton, Westin, Holiday Inns, Inter-Continental, Hyatt,* and other cases in the Federal Circuit where the same issue of "excess costs" was raised under § 1927. The Florida court had sanctioned Petitioner in every case, and in each of these cases the awards were vacated.

The fact that similar awards of all defense costs have been vacated in these other cases shows that no prejudice to Respondent will result if the issue of the propriety of the award is decided on the merits. As Wright, Miller and Kane put it (§2857): "Equitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b). A number of cases say that discretion ordinarily should incline toward granting rather than denying relief, especially if no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue. The policy of thc law to favor a hearing of a litigant's claim on the merits must be balanced against the desire to achieve finality in litigation." (footnotes omitted). No injustice will result if Respondent's award is set aside just as other Defendants' awards have been.

Gila River Ranch involved the issue of whether "the trial court [has] the power to correct it own judicial error

under 60(b)(1) within a reasonable time" not exceeding the time for appeal. The district court had made a mistake, but it did not exercise its discretion to correct its mistake because "it mistakenly thinks it lacks the power to act" (Wright et al §2872, text at footnote 2). The Ninth Circuit reversed and remanded the cases to the district court to correct the mistake. The case did not hold that every Rule 60(b)(1) motion must be filed "within a reasonable time not exceeding the time for appeal." Instead, the case is limited to the time when a trial judge can "hold a hearing and change his decision" (368 F.2d at 357).

That is not the situation presented here. The error on the merits here was in the Florida court awarding all defense costs to Respondent and against Petitioner under 28 U.S.C. §1927. A timely Notice of Appeal was filed, but the clerk of the Florida court mistakenly certified (A-45-46) that no appeal had been filed, so that the judgment could be registered in a foreign court. The motion under Rule 60(b)(1) was filed in the "foreign" court in California, and the appeal proceeded in the Federal Circuit as to other Defendants, and the awards of all defense costs to those Defendants were vacated in that appeal. Respondent was not a party to that appeal of the Action simply because the Notice of Appeal did not say that the order appealed was dated February 10. just February 5, 2003.

Thus, the court was not asked to correct its own mistake, but to correct the mistake of the Florida court in (1) awarding all defense costs under §1927, and (2) certifying that no appeal had been filed when the Action had in fact been appealed.

The Ninth Circuit erred in holding that *Gila* requires a Rule 60(b)(1) motion to be filed within 30 days of the order by the Florida court. "Rule 60(b)(1) must, by the rule's terms, be made not more than one year after the judgment was entered." *Ackermann v. United States*, 340 U.S. 193, 197 (1950).

Where, as here, the slight mistake of identifying the orders on the Joint Motion as having issued on February 5, when some of them were handed down five days later, on February 10, is the kind of mistake that can be corrected under the Rule. Wright et al state at §2858: "More generally, courts have held that the party should not be deprived of the opportunity to present the merits of the claim because of a technical error or slight mistake by the party's attorney," citing six cases.

In *Union Pacific R. Co. v. Progress Rail Services*, 256, F.3d 781, 783 (8th Cir. 2001), Defendant "committed a single, simple error [that] did not result from a mistake of law, nor did [it] act negligently over a long period of time despite receiving warnings about its omission." The district court was reversed. The error here was even less consequential than in *Union Pacific*.

In *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1222 (9th Cir. 2000), an attorney asked opposing counsel to delay filing a motion for summary judgment and counsel refused, suggesting that the attorney should ask the court to extend time for filing a response to the motion. The attorney left the country on a family emergency without seeking the extension of time from the court. The Postal Service filed its motion and filed a request that the motion be granted as unopposed when the attorney filed no

opposition when he was out of the country. The Ninth Circuit reversed and remanded, noting that it's former view that attorney error had to be "beyond an attorney's control" was changed by this Court's decision in *Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 394 (1993). The mistake here was not neglect; it was an oversight that the orders on the Joint Motion were handed down on two separate days, even though the grant of the Joint Motion was in a single order (A-1-21).

In *Walter v. Blue Cross & Blue Shield United of Wisconsin*, 181 F.3d 1198, 1202 (11th Cir. 1999), the court also cited the *Pioneer* case as changing the law where there was an "innocent oversight" in an attorney's office. The oversight that only some of the orders were dated February 5, but not all, was surely innocent, and did not deprive the Federal Circuit of "jurisdiction."

In *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808 (4th Cir. 1988), the court reversed a denial of a Rule 60(b)(1) motion where a meritorious defense was not set forth because of attorney "mistake."

In *Blois v. Friday*, 612 F.2d 938, 940 (5th Cir. 1980), the court said "Doubt should be resolved in favor of a judicial decision on the merits of a case, and a technical error or slight mistake by plaintiff's attorney should not deprive plaintiff of an opportunity to present the true merits of his claims."

In *Tate v. Riverboat Servs., Inc.*, 305 F. Supp. 2d 916 (N.D. Ind. 2004), the motion was filed more than 30

days after the judgment was entered. The district court held that the meritorious defense could be considered.

The Ninth Circuit decision below is not only contrary to its own prior decision in *Bateman*, it is contrary to this Court's decision in *Pioneer*, the decisions in the Fourth, Fifth, Eighth and Eleventh Circuits, and a district court decision in the Sixth Circuit.

CONCLUSION

The mistake in not listing February 10 as the date of some of the many orders following the grant of the Joint Motion by Respondent and others is minor and innocent. The award of $124,000 for all defense costs is clearly inappropriate under 28 U.S.C. §1927, and should not be allowed to stand simply because of the minor oversight. The merits of the award should be addressed as they were in the very same case as to other Defendants whose awards were February 5. All of those other awards, as well as awards in other cases, have been set aside as including more than "excess costs." Petitioner prays that the Petition be granted and the case remanded to the Ninth Circuit to address the merits of the claim.

Dated: June 3, 2005

Respectfully submitted,

JOHN P. SUTTON
Attorney at Law
2421 Pierce Street
San Francisco, CA 94115-1131
Telephone: (415) 929-7408
Facsimile: (415) 922-2885
Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

PHONOMETRICS, INC.,
a Florida Corporation,

Plaintiff,

-vs.-

MARRIOTT INTER-NATIONAL, INC., and HOST MARRIOTT CORP.	No. 94-6533-CIV-RYSKAMP
HOLIDAY INNS, INC.	No. 94-6689-CIV-RYSKAMP
INTER-CONTINENTAL HOTELS CORP.	No. 94-669I-CIV-RYSKAMP
WYNDHAM HOTEL CO.	No. 94-7106-CIV-RYSKAMP
MEDITRUST CORP., f/k/a LA QUINTA INNS, INC.	No. 94-7127-CIV-RYSKAMP
HOSPITALITY FRAN-CHISE SYSTEMS, INC. a/k/a CENDANT CORP., BENCHMARK HOSPITAL-ITY, INC., CLUBHOUSE INNS OF AMERICA, AMFAC RESORTS, LLC, GROSVENOR HOTELS GROUP, FOUR	No. 97-8125-CIV-RYSKAMP

SEASONS HOTELS, INC., CO., PARK LANE HOTELS INTERNATIONAL, RHI HOTELS, INC., INNS OF AMERICA, and INTERSTATE HOTELS CORP.

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' JOINT VERIFIED MOTION FOR ATTORNEYS' FEES AND COSTS

THIS CAUSE is before the Court upon Defendants' Inter-Continental Hotels Corp., Holiday Inns, Inc., Clubhouse Inns of America, Xanterra Parks & Resorts L.L.C. f/k/a AMFAC Resorts, LLC, Four Seasons Hotels, Inc., Grosvenor Hotel Group, Fairmont Hotel Management Co., Park Lane Hotels, Int'l, RHI, Inc. f/k/a Colony Hotels & Resorts, Interstate Hotels LLC (as successor to Interstate Hotels Corp.), Cendant Corp, f/k/a Hospitality Franchise Systems, Inc., Wyndham Int'l, Inc. (successor to Wyndham Hotel Co.), Meditrust Co. f/k/a La Quinta Inns, Inc., Marriott Int'l, Inc., Host Marriott Corp., Benchmark Hospitality, Inc., and Inns of America (erroneously named herein as Economy

Inns of America) (collectively "Defendants") Joint Verified Motion for Attorneys' Fees and Costs, filed June 11, 2002. Defendants' joint motion is now ripe for adjudication.

I. BACKGROUND

This motion arises out of Plaintiff's claims of patent infringement against Defendants. In 1994, Plaintiff filed complaints against Defendants, alleging that Defendants infringed upon Plaintiff's U.S. Patent No. 3,769,463 ("the '463 patent"), by using internal telephone equipment to calculate, display and record the cost of long distance telephone calls originating within its hotels. The complaints charged that Defendants' infringement was willful.

On April 12, 2002, this Court granted the Defendants' Joint Motion for Summary Judgment and entered a final judgment in favor of each Defendant and against Plaintiff. In granting summary judgment, this Court found no dispute of material fact with respect to the. question of whether Defendants' hotels' telephone systems provide callers with a real-time digital display in which the caller can track the cost

of the call in dollars and cents while the call is in progress. This Court pointed out that the Federal Circuit has construed the `463 patent as requiring that the device provide "the caller with real time, accurate information about the costs of the call via digital display as the long distance charges accrue during the call." Phonometrics, Inc. v. Northern Telecom, Inc., 133 F.3d 1459, 1465 (Fed. Cir. 1998). The Court stated that Plaintiff does not even accuse any Defendant of having such a system as it is defined by the Federal Circuit.

On June 11, 2002, Defendants filed their Joint Verified Motion for Attorneys' Fees and Costs. In their motion, Defendants seek (1) fees and costs as sanctions pursuant to 28 U.S.C. § 1927, 35 U.S.C. § 285, and Section 57.105, Florida Statutes, (2) prevailing party costs pursuant to 54(d) of the Federal Rules of Civil Procedure. and 28 U.S.C. § 1920, and (3) pre-judgment interest. Defendants argue that neither Plaintiff nor Plaintiffs counsel had any reasonable basis to assert and maintain patent infringement

claims against Defendants after the Northern Telecom decision and that the maintenance of these lawsuits after January 15, 1998 resulted in unreasonable and vexatious multiplication of the proceedings in this case.

On June 28, 2002, Plaintiff filed its Response. In its Response, Plaintiff argues that Defendants' joint motion is procedurally barred due to errors in signatures, certifications, and contact information and because the motion is untimely. Plaintiff also argues that Defendants are not the prevailing parties and that Section 57.105, Florida Statues has no application in this case. Plaintiff does not address whether or not it unreasonably and vexatiously multiplied the proceedings in these cases.

This Court has determined that a hearing on this matter would not be helpful. Plaintiff has had ample opportunity to respond and be heard with regard to this motion as well as other motions for sanctions and attorneys' fees that have been and are currently pending before this

Court in related Phonometrics patent infringement actions. This motion, therefore, is now ripe for adjudication.

II. DISCUSSION

As a preliminary matter, this Court notes that Defendants' joint motion for attorneys' fees and costs is not procedurally barred. Plaintiff argues that Defendants failed to provide proper signatures, certifications, and contact information. However, upon review of the joint motion, this Court fails to find any serious errors. Any error of signature, certification, or contact is so slight that it fails to produce any confusion or result in Plaintiff being unable to properly respond to the joint motion. Furthermore, most errors have been corrected by Defendants and no longer exist. Plaintiff also argues that the joint motion is untimely. However, Defendants filed a motion for an extension of time by which to file motions for fees and costs, and this Court granted the extension. The joint motion was filed within the time period provided by the extension. Without finding serious procedural errors that hamper the ability of Plaintiff to

respond to the merits of the motion, this Court fails to bar the joint motion. This joint motion may therefore be adjudicated.

In their joint motion, Defendants make three requests: (1) for attorneys' fees and costs incurred after January 15, 1998 as sanctions against Plaintiff and Plaintiff's counsel; (2) for prevailing party costs; and (3) for pre judgment interest. The Court addresses each request in turn.

1. Attorneys' Fees and Costs as Sanctions

In their joint motion, Defendants assert that Plaintiff did not have a reasonable basis to maintain these lawsuits after the Federal Circuit issued its opinion in Northern Telecom. Defendants assert that after Northern Telecom, Plaintiff knew its patent infringement claims against Defendant were factually and legally baseless. Defendants argue that Plaintiffs maintenance of this lawsuit after Northern Telecom was therefore vexatious and unjustified and deserving of an award of attorneys' fees and costs pursuant to 28 U.S.C. § 1927, 35 U.S.C. § 285 and Section 57.105, Florida Statutes. This Court agrees in part and finds

the maintenance of this lawsuit after January 15, 1998 to be vexatious, unjustified and undertaken in bad faith and grants attorneys' fees and costs accordingly.

Under the patent laws, "[t]he court in exceptional cases may award reasonable attorneys' fees to the prevailing party." 35 U.S.C. § 285. Generally, an award of fees in a patent case must be the exception and not the rule. See Milgo Elec. Corp. v. United Business Commun. Inc., 623 F.2d 645, 667 (10th Cir. 1980), cert. denied, 449 U.S. 1066 (1980). The types of conduct which may form a basis for finding a case exceptional include: "`willful infringement, inequitable conduct before the P.T.O. [Patent and Trademark Office], misconduct during litigation, vexatious or unjustified litigation, and frivolous suits.'" Amsted Indus. Inc. v. Buckeye Steel Castings Co., 23 F.3d 374, 376 (Fed. Cir. 1994).

When a party makes "a colorable, albeit weak, argument that was not raised. in bad faith," the court should not grant attorneys' fees. TVI Energy Corms. v. Blaine, 806

F.2d 1057, 1061 (Fed. Cir. 1986). Conversely, when a claim is "clearly hopeless and unquestionably without any possible basis in fact or law," the court has discretion to award attorneys' fees and costs. Chemical Engineering Corp. v. Marlo. Inc., 754 F.2d 331, 335 (Fed. Cir. 1984). Furthermore, "the filing and maintaining of an infringement suit which the patentee knows, or on reasonable investigation should know, is baseless constitutes grounds for declaring a case exceptional under 35 U.S.C. § 285." Eltech Sys. v. PPG Indus., 710 F. Supp. 622 (W.D. La. 1988), affd, 903 F.2d 805, 811 (Fed. Cir. 1990) (stating "where as here, the patentee is manifestly unreasonable in assessing infringement, while continuing to assert infringement in court, an inference is proper of bad faith, whether grounded in or denominated wrongful intent, recklessness, or gross negligence").

In addition to assessing attorneys' fees and costs against a party in exceptional cases, a court may assess attorneys' fees and costs against the party's attorney in

certain circumstances. Title 28 U.S.C. § 1927 provides: "[a]ny attorney... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." To sustain an award against an attorney, the court must find bad faith, see Avirgan v. Hull, 932 F2d 1572, 1582 (11th Cir. 1991), yet "the lack of an explicit finding of bad faith by the trial judge will not preclude sanctions when the record supports such a finding." Baldwin Hardware Corn. v. Frankse Enter. Corp., 78 F.3d 550, 561 (Fed. Cir. 1996).

On February 13, 1997, Plaintiff specifically represented in a hearing before this Court that "the fact of the matter is that there are none of these equipments that these defendants [including each Defendant in this joint motion] have that has a display to the caller during the call in progress." Transcript of February 13, 1997 Hearing before Judge Kenneth Ryskamp. This representation alone signifies that Plaintiff was aware from the moment of filing that

Defendants' hotels' telephone systems did not provide callers with a real-time digital display which tracks the costs of along distance call while the call is in progress.

During this Court's February 13, 1997 hearing, Plaintiff argued that the `463 patent does not require a display to the caller during the call, and pointed out that the Federal Circuit had never stated that the '463 patent requires such a display. At that point in time, Plaintiff's argument was not completely baseless because there was no precedent from the Federal Circuit specifically requiring such display to the caller during the call to find infringement of the `463 patent. As the Federal Circuit explained in Northern Telecom, Intellicall Inc. v. Phonometrics Inc., 952 F.3d 1384 (Fed. Cir. 1992), only decided the issue of "whether the limitation `digital display' meant only visual display or also encompassed machine readable information." Northern Telecom, 133 F.3d at 1464. The Federal Circuit specifically stated that "[a]ny construction of other limitation in claim 1...

made in Intellicall was merely dictum, and therefore has no preclusive effect for this appeal." Id.

Any doubt regarding the requirements of the `463 patent and its claim construction was cleared up in 1998 when the Federal Circuit went into great detail evaluating the scope of the '463 patent in its opinion in Northern Telecom. Specifically, the Federal Circuit restated its previous holding from Intellicall, 952 F.3d at 1387-88, that the patent's required "digital display" does not include machine readable devices that merely save call information on a computer for later access. Northern Telecom, 133 F.3d at 1464. The Federal Circuit also held: 1) "substantially instantaneous display of cumulative call cost in dollars and cents" means "functions to display current, accurate information about the costs of a call" that is displayed for costs "as they accrue, in real time, and not only once the call has ended;" 2) the patent requires that "the costs displayed in the register must be accurate at all times during the call, so that regardless of the point at which the call is terminated, the cumulative cost

displayed in the register will be accurate, without further calculation;" and 3) any real-time information provided by the equipment must be provided to "the caller." Id. at 1464-65. In sum, the Federal Circuit found that the following is required for Plaintiff to maintain a patent infringement suit with respect to the '463 Patent: "[A] devise which displays the cumulative costs of a long distance call both as charges accrue and after the call has been terminated." Id. at 1466.

From the moment the Federal Circuit issued its opinion in Northern Telecom, Plaintiff was on notice that the Federal Circuit's interpretation of the `463 patent requires a real-time visual display which tracks the cost of a long distance call while the call is in progress. Plaintiff, however, never once accused Defendants of violating the `463 patent as it was defined by the Federal Circuit. Instead, Plaintiff attempted to slide around the Federal Court's interpretation of the `463 patent by arguing that Defendants infringed the `463 patent because Defendants' hotels had substantially

instantaneous access to the cost of guest calls through their computer monitors and printers.

Before Northern Telecom, there was confusion surrounding the claim interpretation announced in Intellicall. At the moment Northern Telecom was announced, however, it became clear that infringement of the `463 patent could only be possible if Defendants' hotels provided real-time visual displays showing the costs of the call to the caller during the call. From this point on, the litigation of these cases no longer remained within the normal bounds. Because Plaintiff continued to litigate these cases knowing that its claims could not meet the standard for infringement of the `463 patent articulated by the Federal Circuit, an inference of bad faith is appropriate. Plaintiff's continued maintenance of these cases after Northern Telecom resulted in unjustified multiplication of proceedings. The unjustified, vexatious and bad faith maintenance of these lawsuits is deserving of an award of fees and costs pursuant to both 28 U.S.C. § 1927 and 35 U.S.C. § 285. Accordingly, this Court grants

Defendant attorneys' fees and costs incurred after January 15, 1998, the date, that the Federal Circuit issued its opinion in Northern Telecom. Plaintiff is responsible for these fees and costs pursuant to 35 U.S.C. § 285. Plaintiff's counsel is responsible for these fees and costs pursuant to 28 U.S.C. § 1927.

Defendants request that attorneys' fees and costs be levied against Plaintiff pursuant to Section 57.105, Florida Statutes. Such request, however, is inappropriate as Section 57.105, Florida Statutes does not apply to these patent infringement cases. As has been articulated clearly in case law, "when a cause of action is federal... [courts] ordinarily do not look to state law in considering whether to award attorneys' fees." In re Sheridan, 105 F.3d 1164, 1167 (7th Cir. 1997) (citing Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 n.31 (1975) (stating that state law can govern attorneys' fees in diversity cases); F.D. Rich Co. v. U.S., 417 U.S. 116, 127 (1974) (stating that for a federal cause of action, the remedy is based on federal, not state, law)).

Although the Eleventh Circuit has endorsed awarding attorneys' fees pursuant to Section 57.105, Florida Statutes, such endorsements have been with state causes of action. See Bank Atlantic v. Blythe Eastman Paine Webber, Inc., 955 F.2d 1467, 1478 n.11 (11th Cir. 1992). Since the Phonometrics cases are claims for patent infringement, a federal cause of action, this Court does not apply Section 57.105, Florida Statutes in determining whether to apply attorneys' fees and costs. Defendants' request for fees and costs pursuant to Section 57.105, Florida Statutes is therefore denied.

2. Prevailing Party Costs

In addition to awarding fees and costs pursuant to pursuant to both 28 U.S.C. § 1927 and 35 U.S.C. § 285, this Court awards prevailing party costs pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920. Rule 54(d)(1) of the Federal Rules of Civil Procedure provides, in pertinent part, that "costs other than attorneys' fees shall be allowed as of course to the prevailing party." The taxable

costs recoverable by a prevailing litigant under Rule 54(d) are specifically enumerated in 28 U.S.C. § 1920. Defendants are prevailing parties in these actions because they have obtained final judgments in their favor. See Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co. Ltd., 254 F.3d 987, 1012 (11th Cir. 2001). As prevailing parties, Defendants are entitled to costs pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920.

3. Pre-judgment Interest

This Court declines to grant any pre-judgment interest. Defendants request pre judgment interest; however, Defendants fail to clearly identify the legal basis for their request. It appears that the basis for the request is premised at least in part on Section 57.105, Florida Statutes. As discussed above, Section 57.105, Florida Statutes does not apply to these cases. Any request for pre-judgment interest based upon Section 57.105, Florida Statutes is therefore denied. Beyond Section 57.105, Florida Statutes, this Court is unable to ascertain upon what, if anything, the request for

pre-judgment interest is based. Defendants do not cite to any case law or statute, except for Section 57.105, Florida Statutes, to support their request for pre judgment interest. It appears that Defendants merely assume that they are entitled to pre judgment interest if they are granted fees and costs. Such assumption has no foundation. Without a legal basis for granting pre-judgment interest, this Court declines to grant any pre-judgment interest.

IV. CONCLUSION

For the reasons stated above, and after review of the motion and the pertinent portions of the record, it is hereby

ORDERED AND ADJUDGED that Defendants' Inter-Continental Hotels Corp., Holiday Inns, Inc., Clubhouse Inns of America, Xanterra Parks & Resorts L.L.C. f/k/a AMFAC Resorts, LLC, Four Seasons Hotels, Inc., Grosvenor Hotel Group, Fairmont Hotel Management Co., Park Lane Hotels, Int'l, RHI, Inc. f/k/a Colony Hotels & Resorts, Interstate Hotels LLC (as successor to Interstate Hotels Corp.), Cendant Corp. f/k/a Hospitality Franchise

Systems, Inc., Wyndham Int'l, Inc. (successor to Wyndham Hotel Co.), Meditrust Co. f/k/a La Quinta Inns, Inc., Marriott Int'l, Inc., Host Marriott Corp., Benchmark Hospitality, Inc., and Inns of America (erroneously named herein as Economy Inns of America) Joint Verified Motion for Attorneys' Fees and Costs, filed June 11, 2002, is **GRANTED IN PART AND DENIED IN PART** as explained herein. Specifically, each Defendant is granted reasonable attorneys' fees and costs incurred after January 15, 1998, the date that the Federal Circuit issued its opinion in Northern Telecom, pursuant to 35 U.S.C. § 285 and 28 U.S.C. § 1927. These fees and costs are awarded against the Plaintiff, pursuant to 35 U.S.C. § 285, and against the Plaintiff's counsel, Mr. John P. Sutton, pursuant to 28 U.S.C. § 1927. John P. Sutton and Phonometrics, Inc. are jointly and severally liable for this award. Each Defendant is also awarded prevailing party costs pursuant to 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920. Defendants are not awarded pre-judgment interest.

IT IS FURTHER ORDERED that within ten (10) days of the date of this Order, each Defendant (except for Four Seasons Hotels Limited, Interstate Hotels, LLC, Holiday Inns, Inc. and Inter-Continental Hotels Corp. who have already filed sufficiently clear statements) is to submit a statement to this Court which clearly indicates the amount of prevailing party costs and the amount of attorneys' fees and costs expended since January 15, 1998. In particular, each Defendant shall provide a listing of the prevailing party costs, descriptions of for each type of costs, the total costs incurred after January 15, 1998, descriptions for each type of costs, the total attorneys' fees incurred after January 15, 1998, the total number of hours expended by each attorney working on this case (including local counsel), descriptions for the work done during these hours, and the hourly rates of each attorney working on this case (including local counsel). Prior to submitting their statements, Defendants are urged to review the statements submitted by Four Seasons Hotels Limited, Interstate Hotels, LLC, Holiday Inns, Inc. and

Inter-Continental Hotels Corp. as examples of sufficiently clear statements. Defendants Four Seasons Hotels Limited, Interstate Hotels, *LLC,* Holiday Inns, Inc. and Inter-Continental Hotels Corp, may submit supplemental statements if deemed necessary. Plaintiff may respond to the statements of costs and fees, and each Defendant may reply. Upon review of said statements, the responses, and the replies, this Court will determine the amount of the fees and costs award.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 14th day of August, 2002.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
see attached service list

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF

CALIFORNIA

PHONOMETRICS, INC., No. FJ 03-0027 MJJ

Plaintiff,

v.

HOSPITALITY FRANCHISE SYSTEMS, INC., *et al.*,

Defendants.

_____/

ORDER DENYING PLAINTIFF'S RULE 60(b) MOTION

INTRODUCTION

On October 11, 2003, this Court denied Phonometrics, Inc. and its counsel, John P. Sutton's (collectively, "Plaintiff") Rule 60(b) motion for relief from judgment in this case. Plaintiff's argument at the time was that this Court's judgment, premised as it was on an allegedly incorrect judgment out of the Southern District of Florida, was a "mistake" within the meaning of that rule.

Plaintiff now returns to the Court with a second Rule 60(b) motion, and again raises the contention that Judge Ryskamp of the Southern District erred in entering the judgment in that case. For the reasons set forth below, Plaintiff's motion is DENIED.

FACTUAL BACKGROUND

On April 12, 2002, Judge Ryskamp granted summary judgment in favor of a number of defendants, including Defendant RHI Hotels, Inc ("RHI"). On August 14, 2002, that court granted the defendants' motion for attorneys' fees and costs and instructed the defendants to submit billing statements to determine the amounts of the awards. The defendants submitted the statements, and the court entered the awards of fees and costs on February 5, 2003 and February 10, 2003. The court entered two fees and costs awards on February 5. The remaining eleven fees and costs awards were entered on February 10.

On or about March 5, 2003, Plaintiff filed a Notice of Appeal stating that "PHONOMETRICS, INC. and JOHN P.

SUTTON appeal to the United States Court of Appeals for the Federal Circuit . . . from the AWARD OF ATTORNEYS' FEES dated February 5, 2003." Plaintiff thus failed to appeal the February 10, 2003 orders awarding attorneys' fees and costs to the remaining eleven defendants (which included RHI).

On April 26, 2003, the Federal Circuit issued opinions in *Phonometrics, Inc. v. Choice Hotels International, Inc.*, Appeal No. 02-1360, and *Phonometrics v. ITT Sheraton Corp.*, Appeal No. 02-1417 that, *inter alia*, remanded the cases to Judge Ryskamp for a recalculation of attorneys' fees. The court found that the awards included fees attributable to work performed on previous appeals taken by Phonometrics in 1999—appeals on which Phonometrics had prevailed. To the extent such fees were included in Judge Ryskamp's fee awards, the awards were in error.[1] On November 26, 2003, the Federal Circuit rendered

---

[1] In *ITT Sheraton*, the court also remanded with a directive that the district court specify which costs and fees were

a third opinion coming to the same conclusion as to a separate defendant in *Phonometrics v. Westin Hotel Co.*, Appeal No. 02-1501. The task of recalculating attorneys' fees and costs in these cases is currently before Judge Ryskamp.

On July 21, 2003, Defendant RHI caused judgment to be entered in this Court with respect to one of the February 10 awards. Shortly thereafter, Plaintiff filed a motion for a temporary restraining order and preliminary injunction seeking to stay execution of the judgment. Plaintiff's argument was essentially that he had, in fact, appealed the February 10 orders. Because this Court found Plaintiff's argument unpersuasive—indeed, it would later be rejected by the Federal Circuit—the motion was denied. Plaintiff repeated the same arguments in a Rule 60(b) motion to set

---

"excess costs, expenses and attorneys' fees reasonably incurred" due to the conduct of Plaintiff's counsel as opposed to his client. Sutton Decl., Ex. 1 at 5 (citing 28 U.S.C. § 1927).

aside the judgment on the grounds of "mistake,"[2] which this Court denied on October 11, 2003.

On July 23, 2003, Plaintiff field a Motion to Correct Clerical Error with the Federal Circuit, on the grounds that his failure to include the February 10 orders in the Notice of Appeal was a clerical error. The Court of Appeals denied the motion on August 14, 2003, rejecting Plaintiff's contention that the error was clerical and holding that the error was a jurisdictional bar to the appeal of the February 10 orders. *See Order of United States Court of Appeals for the Federal Circuit*, August 14, 2003 at 3 (holding that "failure to correctly designate what is appealed is a jurisdictional defect").

During this same time frame, Plaintiff was also seeking relief in Florida. It filed a Rule 60(b) motion with Judge Ryskamp on September 9, 2003, in which it argued

---

[2] Rule 60(b)(1) provides, "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final . . . order . . . for the following reasons: (1) mistake . . . ."

that the April 26, 2003 opinions issued by the Federal Circuit (*Choice* and *ITT Sheraton*) which related to the February 5 orders only, established that the fees awards issued on February 10, 2003 (i.e., those for which no appeal was taken) were also erroneously calculated. Judge Ryskamp denied the motion on October 15, 2003, finding that this issue could have been raised in a timely appeal, but not on a Rule 60(b) motion. The motion presently before this Court is nearly identical to the Rule 60(b) motion Judge Ryskamp denied on October 15, 2003.

ANALYSIS

Rule 60(b)(1) provides, "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final . . . order . . . for the following reasons: (1) mistake . . . ." "[T]he word[] 'mistake' . . . include[s] mistake . . . by the judge." *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999).

Plaintiff contends that the fees awarded in *Phonometrics v. Hospitality Franchise Systems, et al.*, No. 97-8125-CIV-RYSKAMP are "erroneous, " as they are supposedly based on expenses the defendants in that case (including the Defendant opposing the present motion, RHI) incurred in connection with appeals on which Phonometrics prevailed. Plaintiff also contends that the fee award is in error insofar as it is not limited, as a relevant statute provides, to the "excess costs" allegedly caused by Plaintiff's counsel when he allegedly "multiplied the proceedings . . . unreasonably and vexatiously." Motion at 6-10 (citing 28 U.S.C. § 1927). In denying Plaintiff's motion on October 15, 2003, Judge Ryskamp observed that Plaintiff was attempting to obtain relief pursuant to Rule 60(b) that it had been foreclosed from seeking by failing to file a timely appeal.

District courts are empowered by Rule 60(b) to correct an award of costs. *See Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th

Cir. 1999); *Liberty Mutual Insurance Co. v. Equal Employment Opportunity Commission*, 691 F.2d 438, 440-41 (9th Cir. 1982); *Gila River Ranch, Inc. v. United States*, 368 F.2d 354, 357 (9th Cir. 1966). The parties apparently do not dispute this fact. Rather, they disagree about the time-period within which the "mistake" may be remedied under Rule 60(b).

Defendant contends that "mistake" of the kind Plaintiff alleges must be brought within the time for appeal—here, thirty days. *See* Federal Rule of Appellate Procedure 4(a). Plaintiff responds by pointing out that (1) Rule 60(b) does not contain a thirty-day time limit, but rather a "reasonable time" provision, and (2) "the decisional law changed after the period of appeal passed" (Reply at 2)—to wit, the *Choice*, *ITT Sheraton*, and *Westin* decisions regarding the February 5 awards were issued.

As for the first point, the Ninth Circuit has been clear that motions under Rule 60(b) for relief from

judicial errors of law must be brought within the time for filing an appeal. The logic in this was explained in *Gila*:

> Why should not the trial court have the power to correct its own judicial error under 60(b)(1) within a reasonable time—which, as we subsequently point out *should not exceed the time for appeal*—and thus avoid the inconvenience and expense of an appeal by the party which the trial court is now convinced should prevail?

368 F.,2d at 357 (citing Moore, Federal Practice § 60.22[3] at 235-38) (emphasis added). *See also Plotkin v. Pacific Telephone and Telegraph Co.*, 688 F.2d 1291, 1293 n.2 (9th Cir. 1982) ("The district court apparently felt that the motion was not timely because it was filed after the expiration of time for appeal. We agree that [Plaintiff] did not comply with the reasonable time requirement.") As the present motion was filed well outside the time for appeal, the motion is untimely.[3]

---

[3] The fact that *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930 (5th Cir. 1987) cited by Plaintiff, stands for a more flexible rule is irrelevant to our analysis. Though the current

Plaintiff's second point is similarly unavailing. The notion that a change in decisional law extends the time period for Rule 60(b) motions has been rejected in this Circuit, and for obvious reasons. The rule Plaintiff advocates:

> would allow litigants to circumvent the appeals process and would undermine greatly the policies supporting finality of judgments. Litigants unsuccessful at trial could forego available appeals and, should subsequent decisions in other cases render their positions viable, they could move to have adverse judgments vacated. The uncertainty resulting from such a rule would be unacceptable.

Plotkin, 688 F.2d at 1293. It is worth noting, in any event, that it is doubtful *Choice*, *ITT Sheraton*, and *Westin* ushered in any change in "decisional law. Those decisions (the first two of which were unpublished) do not appear to chart any new legal territory helpful to Plaintiff. Plaintiff certainly

---

motion requires the Court to evaluate a judgment issued by the Southern District of Florida—which is governed by Fifth Circuit decisions issued prior to the creation of the Eleventh Circuit—this Court is governed by Ninth Circuit law in evaluating this Rule 60(b) motion.

does not specify what the new "law" is that emanates from these decisions.

Even if Plaintiff were not barred from bringing this motion by its failure to do so within the time for filings an appeal, however, its motion would still be untimely. Rule 60(b)'s "reasonable time" standard applies to mistakes that amount to little more than "inadvertent judicial oversight." Wright Miller & Kane, Federal Practice and Procedure: Civil 2d § 2858. Assuming Plaintiff's claims of error can be characterized in this way—which seems highly unlikely—does not change the fact that Plaintiff waited over nine months from the date of the February 10 orders to file this Rule 60(b) motion. Plaintiff provides no justification for its tardy filing. *See id.* at § 2857 (under Rule 60(b) "reasonable time" analysis, "[courts] have been unyielding in requiring that a party show good reason for the failure to take appropriate action sooner").[4]

---

[4] It is worth noting that Plaintiff filed its appeal with respect to the February 5, 2003 awards on or about March 5, 2003.

CONCLUSION

For the foregoing reasons, Plaintiff's motion is hereby **DENIED**.

IT IS SO ORDERED.

Dated: February 13, 2004

/s
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

Plaintiff was presumably aware at the time that Judge Ryskamp had committed "mistakes" in calculating certain of his fee awards. Certainly by April 26, 2003, when the Federal Circuit issued its decisions in *ITT Sheraton* and *Choice*, Plaintiff was aware of the purported error in calculating with respect to the February 10 awards. Nevertheless, Plaintiff waited until December 23, 2003—or over seven months—to file the present motion. Plaintiff shows no good cause for this delay.

APPENDIX C

FILED

MAR 10 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHONOMETRICS, INC.,	) No. 04-15528
Plaintiff – Appellant,	) D.C. No. CV-03-00027-MJJ
v.	) MEMORANDUM*
HOSPITALITY FRANCHISE SYSTEMS, INC., et al.	
Defendants - Appellees.	

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Submitted February 15, 2005**
San Francisco, California

Before: ALARCÓN, SILER*** and SILVERMAN, Circuit Judges.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument.

*** The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

Phonometrics, Inc. appeals from the denial of a Rule 60(b) motion by the district court. We review a district court's denial of a Rule 60(b) motion for abuse of discretion. Bateman v. U.S. Postal Service, 231 F.3d 1220, 1223 (9th Cir. 200). We affirm.

In 1996, Phonometrics, Inc. filed suit against several hotel chains for patent infringement. The suits were consolidated in the Southern District of Florida by the Judicial Panel on Multidistrict Litigation. In 2002 the district court in Florida granted summary judgment in favor of the defendants, followed by awards of attorneys' fees and costs entered on February 5 and 10, 2003. One award entered on February 10 held Phonometrics and its counsel, John Sutton (cumulatively "Phonometrics"), jointly and severally liable. Phonometrics failed to properly appeal this award. When the judgment was registered in the Northern District of California, Phonometrics moved on December 22, 2003, to vacate under Federal Rule of Civil Procedure 60(b).

Federal Rules of Appellate Procedure 4(a)(1) states that, "except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c) , the notice of appeal … must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1) (emphasis added). The exception in Rule 4(a)(4) is:

> (A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
> …
>
> > (vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

Fed. R. App. P. 4(a)(4).

Rule 60(b) authorizes relief from judgments for "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). The "mistakes" of judges may be remedies under this provision, which also encompasses mistakes in the application of the law. A trial judge may, within a reasonable time, but not exceeding the time for

appeal, hold a rehearing under Rule 60(b) and change the award. See Gila River Ranch, Inc. v. United States, 368 F.2d 354, 357 (9th Cir. 1966).

To be timely, Phonometrics' Rule 60 motion must have been filed within the 30-day window following the entry of the judgment awarding attorneys' fees. Instead, Phonometrics filed a Rule 60(b) motion in Florida on October 15, 2003, approximately seven months past the window for appeal. The court in Florida denied that motion as untimely. The motion here was filed in December, an additional delay of two months. If the motion filed with the original court was untimely, an identical motion made two months later in a foreign jurisdiction is still untimely. The district court did not abuse its discretion in holding the motion untimely.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

PHONOMETRICS, INC.,	)	Case No. 97-8125-CIV-RYSKAMP
Plaintiff,	)	
v.	)	NOTICE OF APPEAL
HOSPITALITY FRANCHISE SYSTEMS, INC., ET AL.	)	
Defendants.	)	

Phonometrics, Inc. hereby appeals to appeals to the United States Court of Appeals for the Federal Circuit (not the Eleventh Circuit) from the Order of October 23, 1998, dismissing the complaint. A check in the amount of $105.00 is enclosed.

Dated: November 12, 1998 Respectfully submitted,

BRYAN, HINSHAW & BARNET

By _____
JOHN P. SUTTON

(CA SBN 36560)
425 California Street,
Suite 900
San Francisco, CA 94104
Tel: 415 296-0800
Fax: 415 296-0812
Attorney of record under Rule
6 of the Rules of Procedure of
the Judicial Panel on
Multidistrict Litigation

APPENDIX E

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

(West Palm Beach Division)

Case No. 97-8125-CIV-RYSKAMP

PHONOMETRICS, INC.,
a Florida corporation,

Plaintiff,

v.

HOSPITALITY FRANCHISE SYSTEMS, INC., aka CENDANT CORPORATION, BENCHMARK HOSPITALITY, INC., CLUBHOUSE INNS OF AMERICA, AMFAC RESORTS,LLC, GROSVENOR HOTELS GROUP, FOUR SEASONS HOTELS, INC., FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, RHI HOTELS, INC., INNS OF AMERICA, OUTRIGGER LODGING SERVICES, and INTERSTATE

NOTICE OF APPEAL TO THE FEDERAL CIRCUIT

HOTELS CORPORATION,

Defendants.
_____/

PLEASE TAKE NOTICE that PHONOMETRICS, INC. appeals to the United States Court of Appeals for the Federal Circuit (not the Eleventh Circuit) from the ORDER GRANTING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT dated April 12, 2002. The filing fee of $105.00 is enclosed herewith.

Dated: May 9, 2002

_____
JOHN P. SUTTON
(CA SBN 36560)
Attorney at Law
2421 Pierce Street
San Francisco, CA 94115-1131
Telephone: (415) 929-7408
Facsimile: (415) 922-2885
Attorney for Plaintiff-Appellant,
Phonometrics, Inc.
Appearing pursuant to MDL Rule 1.4

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach Division)

Case No. 97-8125-CIV-RYSKAMP

PHONOMETRICS, INC.,
a Florida corporation,

Plaintiff, **NOTICE OF APPEAL TO THE FEDERAL CIRCUIT**

v.

HOSPITALITY FRANCHISE SYSTEMS, INC., aka CENDANT CORPORATION, BENCHMARK HOSPITALITY, INC., CLUBHOUSE INNS OF AMERICA, AMFAC RESORTS, LLC, GROSVENOR HOTELS GROUP, FOUR SEASONS HOTELS, INC., FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, RHI HOTELS, INC., INNS OF AMERICA, OUTRIGGER LODGING SERVICES, and INTERSTATE HOTELS CORPORATION,

Defendants.
_____/

PLEASE TAKE NOTICE that PHONOMETRICS, INC. and JOHN P. SUTTON appeal to the United States Court of Appeals for the Federal Circuit (not the Eleventh Circuit) from the AWARD OF ATTORNEYS' FEES dated February 5, 2003. The filing fee of $105.00 is enclosed herewith.

Dated: 3/3/03

JOHN P. SUTTON (CA SBN 36560)
2421 Pierce Street
San Francisco, CA 94115-1131
Telephone: (415) 929-7408
Facsimile: (415) 922-2885
Attorney for Plaintiff-Appellant,
Phonometrics, Inc.
Appearing pursuant to MDL Rule 1.4

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach Division)

PHONOMETRICS, INC.	) No. 97-8125-
	) CIV-RYSKAMP /
Plaintiff,	) VITUNAC
	)
v.	)
	)
HOSPITALITY FRAN-	)
CHISE SYSTEMS, INC,	)
ET AL. – RHI Hotels, Inc.	)
	)
Defendants.	)
	)

CERTIFICATION OF JUDGMENT FOR REGISTRATION IN ANOTHER DISTRICT

I, Clarence Maddox, Clerk of the United States district court certify that Award of Attorneys' Fees is a true and correct copy of the original Award of Attorneys' Fees entered in this action on February 10, 2003 [DE 382], as it appears in the records of this court, and that no notice of appeal from this Award of Attorneys' Fees has been filed, and no motion of any kind listed in Rule 4(a) of the Federal Rules of Appellate Procedure has been filed.

IN TESTIMONY WHEREOF, I sign my name and affix the seal of this Court.

Date: May 13, 2003

Clarence Maddox
Clerk, United States District Court for the Southern District of Florida

_____
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

PHONOMETRICS, INC., No. 94-6533-CIV-RYSKAMP

Plaintiff, No. 94-6689-CIV-RYSKAMP

v. No. 94-6691-CIV-RYSKAMP

MARRIOTT INTERNATIONAL, INC., and HOST MARRIOTT CORP. No. 94-7106-CIV-RYSKAMP No. 94-7127-CIV-RYSKAMP

HOLIDAY INNS, INC. No. 97-8125-CIV-RYSKAMP

INTER-CONTINENTAL HOTELS CORP.

WYNDHAM HOTEL CO.

MEDITRUST CORP. f/k/a LA QUINTA INNS, INC.

HOSPITALITY FRANCHISE SYSTEMS, INC. a/k/a CENDANT CORP.; BENCHMARK HOSPITALITY, INC., CLUBHOUSE INNS OF AMERICA, AMFAC RESORTS, LLC, GROSVENOR HOTELS GROUP, FOUR SEASONS HOTELS, INC., FAIRMONT HOTEL MANAGEMENT CO., PARK LANE HOTELS INTERNATIONAL, RHI HOTELS, INC., INNS OF

AMERICA, and INTERSTATE
HOTELS CORP.

Defendants.
_____/

AWARD OF ATTORNEYS' FEES

On August 14, 2002 **[DE 159]**, this Court granted in part and denied in part Defendants' Joint Verified Motion for Attorneys' Fees and Costs. The Court granted each Defendant reasonable attorneys' fees and costs incurred after January 15, 1998, the date that the Federal Circuit issued its opinion in Northern Telecom, pursuant to 35 U.S.C. § 285 and 28 U.S.C. § 1927. The Court awarded these fees and costs against Plaintiff pursuant to 35 U.S.C. § 285 and against Plaintiff"s counsel, Mr. John P. Sutton pursuant to 28 U.S.C. § 1927. Plaintiff and Plaintiff's counsel are jointly and severally liable for this award. The Court also ordered that each Defendant is entitled to prevailing party costs pursuant to 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920. The Court did not award pre judgment interest. Defendants have submitted their statements of fees

and costs and Plaintiff has filed his objections to said statements. This matter is now ripe for adjudication.

I. LEGAL STANDARD

A. Attorneys' Fees

In determining an award of attorneys' fees, this Court must begin by calculating the lodestar which is the product of the hours reasonably expended by counsel multiplied by a reasonable hourly rate. Norman v. Housing Authority of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). The Court may then consider whether this amount is to be adjusted for extraordinary results. Id. at 1302. Courts are also expected to use their knowledge and experience concerning reasonable and proper fees when making fee determinations. See Norman, 836 F.2d at 1303. The moving party bears the burden of submitting evidence supporting the fee award and "[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly." Hensley, 411 U.S. at 433. The time records should be detailed enough

to enable a court to eliminate excessive, redundant, unnecessary, or otherwise unreasonably expended hours. Id. at 437. The Supreme Court has instructed, however, that the lodestar is presumptively reasonable and should be modified only in exceptional cases. See City of Birmingham v. Dague, 505 U.S. 557, 562 (1992).

II. DISCUSSION

RHI Hotels, Inc. was represented by Coudert Brothers LLP. RHI seeks $123,307 in attorneys' fees from January 15, 1998 and $1,000 in fees paid to McKenna & Cuneo for the preparation of the Joint Motion for Summary Judgment. The Court finds that RHI attorneys reasonably spent 421.2 hours defending against Plaintiffs claims. The Court finds that the attached documentation shows that none of the hours documented were excessive, duplicative, or inadequately documented. See Hensley, 461 U.S. at 432-34.

After determining the hours reasonably spent on the litigation, the Court must set a reasonable hourly rate. "A reasonably hourly rate is the prevailing market rate in the

relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Norman, 836 F.2d, at 1299. RHI's submission indicates that its counsel and their staff provided 421.2 hours of representation at a blended rate of $292.75 per hour for a total of $123,307 in fees. The Court also finds that RHI may recover the $1,000 for the preparation of the Joint Summary Judgment Motion.

Therefore, the lodestar amount for RHI is $124,307. The Court does not find that this amount should be modified.

IV. CONCLUSION

The Court, being fully advised and having considered the pertinent portions of the record, hereby

ORDERS AND ADJUDGES that Plaintiff and his counsel are jointly and severally liable to Defendant RHI for attorneys' fees in the amount of $124,307.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 10th day of February, 2003.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
See motion service list